



FRIENDS OF ANIMALS & CRAIG C. DOWNER

188 IBLA 394

Decided November 7, 2016



United States Department of the Interior  
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Interior Board of Land Appeals  
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FRIENDS OF ANIMALS & CRAIG C. DOWNER

IBLA 2016-286

Decided November 7, 2016

Appeal and petition to stay a decision of the Field Manager, Mount Lewis Field Office, Battle Mountain District, Bureau of Land Management, approving the Rocky Hills Herd Management Area Fertility Control Darting Project in Eureka County, Nevada.

Petition for stay denied.

1. Administrative Procedure: Stays

A failure to satisfy any one of the four stay criteria under 43 C.F.R. § 4.21(b) will result in denial of a petition for stay.

2. Administrative Procedure: Stays

Appellants seeking to demonstrate a likelihood of immediate and irreparable harm must present sufficient justification showing that the alleged harm is likely to occur and be immediate and irreparable. Bare allegations are of no value. Appellants must show that the injury is likely if a stay is denied, not theoretical or merely feared as liable to occur at some indefinite time.

APPEARANCES: Michael Ray Harris, Esq., and Jennifer Best, Esq., Centennial, Colorado, for Friends of Animals and Craig C. Downer; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE RIECHEL

Friends of Animals and Craig C. Downer, a wildlife ecologist and member of Friends of Animals, have appealed from and petitioned to stay the effect of an August 24, 2016, decision of the Field Manager, Mount Lewis Field Office, Battle

Mountain District, Bureau of Land Management (BLM), approving the Rocky Hills Herd Management Area (HMA) Fertility Control Darting Project in Eureka County, Nevada.

Appellants seeking to stay the effect of a BLM decision pending an appeal must demonstrate that a stay is warranted by showing sufficient justification that there is, among other things, a likelihood of immediate and irreparable harm if the stay is not granted. Appellants allege that irreparable harm is likely if we do not grant a stay because Appellants will suffer emotional distress from knowing that the Fertility Control Darting Project will occur; however, allegations of emotional distress from the contemplation of possible harm are not sufficient justification of the likelihood of irreparable injury. Appellants also claim that the fertility control to be used will harm the horses, but they have not provided sufficient justification that this harm is likely to be immediate and irreparable. Finally, Appellants claim that they were denied an opportunity to participate in BLM's decision to conduct the Fertility Control Darting Project and will be harmed if the Project proceeds without their input, but a procedural violation by itself is not sufficient justification of the likelihood of irreparable injury for purposes of granting a stay pending appeal. Because Appellants have not demonstrated sufficient justification of a likelihood of immediate and irreparable harm if we do not stay BLM's Fertility Control Darting Project, we deny their petition.

*The Rocky Hills HMA Fertility Control Darting Project*

The Rocky Hills HMA encompasses 84,000 acres in Eureka County, Nevada, and is one of the HMAs in the Callaghan Complex.<sup>1</sup> To understand the context for BLM's Rocky Hills HMA Fertility Control Darting Project, it is helpful to be familiar with BLM's 2010 Callaghan Complex Wild Horse Gather Plan decision. In 2010, BLM issued a decision to gather 866 wild horses in the Callaghan Complex and the nearby New Pass/Ravenswood HMA.<sup>2</sup> BLM planned to remove 221 of those wild horses as excess and release all of the remaining wild horses back into the Complex after applying a fertility control vaccine, PZP-22 (Porcine Zona Pellucida), to approximately 323 mares.<sup>3</sup> The 2010 gather plan was intended to maintain the wild horse population within the appropriate management level (AML) to allow degraded rangelands to recover and foster a thriving natural ecological balance.<sup>4</sup>

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<sup>1</sup> Rocky Hills HMA Fertility Control Darting Decision at 1-2 (Aug. 24, 2016) (Rocky Hills HMA Decision).

<sup>2</sup> Callaghan and New Pass/Ravenswood Complex Decision at 5 (Oct. 29, 2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

BLM stated that it intended to return to the Complex to continue population control activities, including removing any excess wild horses and re-treating mares, and explained that re-application of fertility control at regular intervals could eliminate the need to remove wild horses in the future.<sup>5</sup> BLM's 2010 decision was informed by an Environmental Assessment (EA), conducted pursuant to the National Environmental Policy Act (NEPA) and its implementing regulations, and a Finding of No Significant Impact (FONSI).<sup>6</sup>

In the 2016 Fertility Control Darting Project decision that is the subject of this appeal, BLM decided “to continue the implementation of fertility control within the Rocky Hills HMA as part of the 2010 Callaghan Complex Decision through a remote darting program and administration of the ZonaStat-H vaccine” (another form of the PZP vaccine) so BLM could maintain the AML in the Rocky Hills HMA.<sup>7</sup> Although the current horse population of the Rocky Hills HMA is within the AML, BLM estimated that the population will exceed the AML in 2017.<sup>8</sup> BLM explained that “[d]arting is similar to the hand injection of PZP, except that the injection can be achieved without capturing and handling the horses, thereby significantly reducing the stresses or other potential impacts associated with the capture and handling of horses for treatment and release.”<sup>9</sup>

BLM did not prepare a project-specific EA to inform this decision; instead, BLM completed a Determination of NEPA Adequacy (DNA), in which it concluded that the Fertility Control Darting Project “is essentially similar to an alternative analyzed in the prior NEPA documents,” and the effects of the Project “are similar to those disclosed” in the 2010 Callaghan Complex EA, and so no further NEPA analysis was necessary.<sup>10</sup>

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<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 2 (2010 decision based on EA and FONSI); Callaghan and New Pass/Ravenswood Complex Wild Horse Gather Preliminary EA DOI-BLM-NV-B010-2010-0087-EA (October 2010); 42 U.S.C. §§ 4321-4370h (2012) (NEPA); 40 C.F.R. parts 1500-1508 (Council on Environmental Quality NEPA regulations); 43 C.F.R. part 46 (Department of the Interior NEPA regulations).

<sup>7</sup> Rocky Hills HMA Decision at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 6; Determination of NEPA Adequacy (DNA), DOI-BLM-NV-B010-2016-0042-DNA at 6, 7 (August 2016).

*Friends of Animals and Craig C. Downer's Appeal and Petition for Stay*

Appellants timely appealed BLM's August 2016 Fertility Control Darting Project decision. Appellants allege that BLM violated NEPA by failing to conduct an EA and invite public participation in the decision and by failing to accurately analyze the impacts associated with PZP use. Appellants ask the Board to stay the effect of the decision to preserve the *status quo* while the appeal is pending.

*Standard for Granting a Stay*

Any person who is adversely affected by a BLM decision administering BLM's wild horse and burro protection, management, and control program may appeal and petition to stay the decision in accordance with the Board's regulations at 43 C.F.R. Part 4.<sup>11</sup>

[1] Under the Board's regulations, a party requesting a stay bears the burden of proof to demonstrate that a stay should be granted.<sup>12</sup> Specifically, a petition for a stay must show sufficient justification based on the following standards: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not granted; and (4) whether the public interest favors granting the stay.<sup>13</sup> A failure to satisfy any one of the stay criteria will result in denial of a petition for stay.<sup>14</sup>

*Appellants Have Not Demonstrated a Likelihood of Immediate and Irreparable Harm Justifying a Stay*

We find that Appellants have not shown sufficient justification to stay BLM's Fertility Control Darting Project decision. Appellants have not demonstrated that immediate and irreparable harm is likely if the stay is not granted, so we do not need to evaluate the other three stay criteria. Here we examine each of Appellants' arguments for the likelihood of immediate and irreparable harm and explain why each argument is not persuasive.

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<sup>11</sup> 43 C.F.R. § 4770.3(a).

<sup>12</sup> 43 C.F.R. § 4.21(b)(2).

<sup>13</sup> *Id.* § 4.21(b)(1).

<sup>14</sup> *Petan Company of Nevada v. BLM*, 186 IBLA 81, 91 (2015).

# 1. Appellants' Alleged Emotional Distress Is Not Irreparable Harm

First, Appellants assert that the members of Friends of Animals “have an intimate connection with the Rocky Hills horses” and will suffer emotional distress from the knowledge of the severe disturbance and harm to the herd and individual horses from the injection of PZP.<sup>15</sup> Appellants cite several cases in which Federal courts found that emotional distress caused by the knowledge of harm to animals that a person cares about constitutes irreparable injury to that person.<sup>16</sup>

The cases Appellants cite to persuade us to find that emotional distress qualifies as immediate and irreparable harm are distinguishable because they all involve the killing of animals by hunting or culling.<sup>17</sup> BLM’s decision in this case, however, is not intended to result in the death or even the removal of any horses in the Rocky Hills HMA. The darting procedure enables BLM to administer fertility control without gathering the wild horses.<sup>18</sup> Like the District Court for the District of Columbia found in a case where the appellants alleged that emotional distress justified enjoining a wild horse gather, we find that “reliance on emotional distress as a form of irreparable injury . . . is misplaced” where BLM does not intend to kill any healthy wild horses and the risk of death or serious injury to the horses appears to be low.<sup>19</sup> This is doubly true where BLM does not plan to gather the horses at all. We do not find that Appellants’ contemplation of harm to the wild horses in the Rocky Hills HMA amounts to the type of injury necessary to justify a stay of BLM’s decision.<sup>20</sup>

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<sup>15</sup> Appeal, Statement of Reasons, and Petition for Stay (Petition) at 21-22.

<sup>16</sup> *Id.* at 20-21.

<sup>17</sup> See *The Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 220-22 (D.D.C. 2003) (decision granting permit to kill swans); *The Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (decision authorizing organized hunt to thin the population of bison); *Red Wolf Coalition v. North Carolina Wildlife Resources Commission*, 2014 U.S. Dist. LEXIS 65601 at \*25 (E.D.N.C. May 13, 2014) (decision authorizing the hunting of coyotes which appellants argued could result in the death of red wolves); *Humane Society of the United States v. Bryson*, 2012 U.S. Dist. LEXIS 74688 at \*21-\*26 (D. Or. May 30, 2012) (decision authorizing killing of California sea lions).

<sup>18</sup> Rocky Hills HMA Decision at 4.

<sup>19</sup> *Colo. Wild Horse & Burro Coalition, Inc. v. Jewell*, 130 F. Supp. 3d 205, 220 (D.D.C. 2015).

<sup>20</sup> See *id.* (“Plaintiffs’ observation or contemplation of the stress and small risk of physical harm that the horses might suffer while being gathered—sincere as it might be—does not rise to the level of a cognizable, irreparable injury.”).

2. Appellants Have Not Shown Sufficient Justification That It Is Likely That Administration of PZP Will Irreparably and Immediately Harm Horses

Second, Appellants claim that darting mares with PZP “can permanently alter the herd’s social structures and family units, further thwarting Appellants’ ability to view, study, and photograph a healthy, naturally behaving wild herd.”<sup>21</sup> Mr. Downer asserts that “PZP can weaken horses’ immune system, increase stress, disrupt band dynamics, cause still births and autoimmune diseases, and cause out of season births which could result in death.”<sup>22</sup> Also, Appellants argue that the administration of PZP will reduce the size of the herd and make it difficult for Friends and their members to find wild horses on the 84,000-acre Rocky Hills HMA.<sup>23</sup>

[2] Appellants seeking to demonstrate a likelihood of immediate and irreparable harm must present a sufficient justification that shows the alleged harm is likely to occur.<sup>24</sup> Bare allegations are of no value.<sup>25</sup> Appellants must show that the injury is likely to occur if a stay is denied, not theoretical or “‘merely feared as liable to occur at some indefinite time.’”<sup>26</sup> We do not find that Appellants’ arguments or the record on appeal provides sufficient justification for Appellants’ claim that the darting project is likely to cause immediate and irreparable harm to the herd or individual horses.

Appellants provide a declaration by Mr. Downer in which he provides a “summary of proven harms to wild horses caused by PZP,” vaguely refers to “scientific studies [he] has perused,” and reports “receiv[ing] numerous reports from people who closely observe and live near wild horses treated with PZP,”<sup>27</sup> but cites no specific information or data to support his claims. Appellants also cite a declaration by Dr. Cassandra Nuñez, Ph.D., filed in the 2015 district court case

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<sup>21</sup> Petition at 22.

<sup>22</sup> *Id.* at 22-23 (citing Declaration of Craig C. Downer in Support of Appeal and Petition for Stay (Downer Decl.) ¶¶ 21-23).

<sup>23</sup> *Id.* at 23.

<sup>24</sup> 43 C.F.R. § 4.21(b)(1); *see also Wisconsin Gas Co. v. Fed. Energy Regulatory Com.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (an appellant seeking a stay must “substantiate the claim that irreparable injury is ‘likely’ to occur”); *Colo. Wild Horse & Burro Coalition, Inc.*, 130 F. Supp. 3d at 218 (“Plaintiffs must present the Court with enough evidence to ‘substantiat[e]’ their claim of irreparable injury.”) (quoting *Wisconsin Gas Co.*, 758 F.2d at 674).

<sup>25</sup> *See Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>26</sup> *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

<sup>27</sup> Downer Decl. ¶¶ 21, 22, 23.

that Friends of Animals brought against BLM, for the proposition that the horses that receive PZP, and consequently the entire herd, may experience “long-lasting negative effects” and will therefore be irreparably injured.<sup>28</sup> But BLM explains that studies show the possibility of PZP effects becoming irreversible occur only after administration for five consecutive years, the Rocky Hills HMA Decision does not authorize PZP darting for more than five years, and “many mares in the Rocky Hills HMA are unlikely to receive five consecutive years of PZP treatment.”<sup>29</sup>

With respect to Appellants’ assertion that the administration of PZP will reduce the size of the herd and make it difficult for Friends of Animals and their members to find wild horses on the Rocky Hills HMA, we observe again that BLM’s decision will not remove any wild horses from the HMA, even temporarily, as occurred in 2010. Based on our review of the record before us, we conclude that neither this assertion nor any other of Appellants arguments provides sufficient justification for Appellants’ claim of immediate and irreparable harm.<sup>30</sup>

### 3. An Alleged NEPA Violation Alone Does Not Show Irreparable Harm

Finally, Appellants contend that they are irreparably harmed by BLM’s failure to prepare an environmental impact statement or an EA because they were denied the opportunity to participate in a public notice and comment process for the Fertility Control Darting Project.<sup>31</sup> Appellants assert that this failure was critical because it deprived Appellants of the opportunity to bring to BLM’s attention significant new information about PZP.<sup>32</sup> Appellants observe, “Once the actions are completed, the injury cannot be compensated and there is no way for the public to be involved in the decision-making process.”<sup>33</sup> Appellants cite a district court case for the proposition that, “[w]hen a procedural violation of NEPA is combined with a showing of

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<sup>28</sup> Petition at 23 (citing Declaration of Cassandra Nuñez in Support of Plaintiffs’ Temporary Restraining Order/Motion for Preliminary Injunction, Case No. 3-15-CV-00057-LRH-WGC (D. Nev.) at ¶¶ 5-8).

<sup>29</sup> BLM Response to Stay Petition and to Statement of Reasons at 26 (citing Decision at 8).

<sup>30</sup> *See Colo. Wild Horse & Burro Coalition, Inc.*, 130 F. Supp. 3d at 220 (any added difficulty in finding horses to observe because BLM removed some in a gather does not constitute irreparable harm, and because some horses will remain on the HMA, plaintiffs’ interest in observing these horses would remain protected).

<sup>31</sup> Petition at 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury.”<sup>34</sup>

Appellants are correct that Federal courts have found that procedural violations of NEPA support claims of irreparable injury; however, these same courts have emphasized that “a procedural violation of NEPA is not itself sufficient to establish irreparable injury.”<sup>35</sup> Like the Federal courts, we find that a procedural violation alone is insufficient justification of the likelihood of immediate and irreparable harm to justify a stay. As we have held here, based on the record to date, Appellants have not provided sufficient justification for the likelihood of any other immediate and irreparable harm, so any alleged NEPA violation alone does not justify a stay.

For these reasons, we are not persuaded that Appellants have demonstrated that there exists a likelihood of immediate and irreparable harm justifying a stay of the effect of BLM’s decision to approve the Rocky Hills HMA Fertility Control Darting Project. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,<sup>36</sup> we deny Appellants’ petition for a stay.

/s/

Silvia M. Riechel  
Administrative Judge

I concur:

/s/

James K. Jackson  
Administrative Judge

<sup>34</sup> *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009).

<sup>35</sup> *Id.*; see also *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998).

<sup>36</sup> 43 C.F.R. § 4.1.